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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 150

WILLIAM D. PELLEY, *Petitioner,*

v.

JOHN B. COLPOYS, UNITED STATES MARSHAL IN AND FOR THE DISTRICT OF COLUMBIA, *Respondent.*

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

I

This case is of great public importance. Countless columns have been devoted to it by the newspapers of the entire nation and it has received much attention on the nation's radio networks in individual and coast-to-coast broadcasts.

Throughout America thousands upon thousands of citizens, among them many well-known lawyers, refer to this case with the sinister remark that the petitioner "is being railroaded". Petitioner has offered to prove that this is true but has been denied that privilege in the lower courts for the unconscionable reason that "the court cannot go

outside the record on Habeas Corpus reviewing an order for extradition."

The constitutional rights of petitioner have been flagrantly violated throughout these proceedings. Applicable decisions of this court, of other courts of the United States and of the courts of the forty-eight states have been contemptuously ignored.

Habeas Corpus, the most sacred bulwark and protection of the American people against oppression, has been completely and finally emasculated.

The lower courts have made the outrageous ruling that the mere issuance of a capias by petitioner's former prosecutor, now a judge, automatically constitutes petitioner a fugitive (R. 209) while at the same time making Findings of Fact that no subsequent charge of misbehavior of any kind had been made against petitioner and that petitioner paid the full monetary penalty in lieu of serving a jail sentence. A new version of due process.

The question involved in this case is not complex, vague or difficult to understand. It is simply this. May one who has paid a fine, after having been given a choice of either paying or going to jail, be further punished under the same indictment or deprived of his liberty in connection therewith? The Constitution of the United States answers no. (Fifth Amendment.)

In forthright and ringing terms this Honorable Court answered the question in the leading case on the subject, Ex parte Lange, 18 Wall. 163. In the course of a painstaking and extensive opinion on that very question this Honorable Court said,

> "The judgment of the court having been executed so as to be a full satisfaction of one of the alternative penalties of the law, the power of the court as to that offense is at an end."
>
> "A second judgment on the same verdict is, under such circumstances, void for want of power, and it affords no authority to hold the party a prisoner, and he must be discharged."

It was thought by the legal profession of America that the question had been finally disposed of but the lower court did not mention and respondent ignores and evades all discussion of the most pertinent question with which we are here concerned. The Federal Courts of the United States have given effect to the above mentioned rule of law but the lower court rejected it in this case, holding that although petitioner has paid one of the alternative penalties (Findings of Fact (R. 208-9)) he is still subject to the jurisdiction of the Buncombe County Court. Obviously, if the "power of the court as to that offense is at an end" the power to extradite does not exist.

The respondent claims that the failure of the North Carolina Court to sentence petitioner on the second count justifies his return six years later for the purpose of now imposing sentence. Respondent says petitioner consented to the continued prayer for judgment on the second count so he cannot now object to being sentenced on it. Who ever heard of a defendant demanding that a court impose sentence on a count when the court has indicated a suspension of judgment on that count? Even though the court intended to impose sentence at a later date its power to do so was lost by its imposing sentence on the previous count and this rule has been adhered to by all the federal courts of the United States and by the superior courts of the forty-eight states.

> "The district court, after judgment rendered in first count of information, has no power to render a second judgment at a later term against the accused under the second count of the indictment *notwithstanding that a continuance was had to a later date with a view of considering action to be taken on second count.*"
>
> *Gillespie* v. *Walker*, 296 F. 330 (W. Va. 1924);
> *Edgerton* v. *Commonwealth*, 5 Allen 514 (1862);
> *Commonwealth* v. *Bennett*, 2 Va. Cas. 235;
> *Commonwealth* v. *Foster*, 122 Mass. Rep. (1877) 317;
> *Guenther* v. *People*, 24 N. Y. 100;
> *Girtz* v. *Commonwealth*, 22 Penn. St. 351;

Weinzorpflin v. *State*, 7 Black 186;
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State v. *Hill*, 30 Wis. 416;
Kirk v. *Commonwealth*, 9 Leigh 627;
Nabors v. *State*, 6 Ala. 700;
Morris v. *State*, 8 Sm. and Marsh 762;
Bens v. *U. S.* 266 F. 152, (1920) 41 S. Ct. 8, 254 U. S. 634, 65 L. Ed. 449

Unless Certiorari is granted and the lower court reversed in this case the above mentioned section of the Constitution, the decisions of this Court and of all the courts throughout the United States, relating to that section of the Constitution, are to be thrown upon the junk heap, for the record clearly shows that petitioner was given the alternative of either paying a fine or going to jail. Petitioner chose the latter. The lower court evaded this question by ignoring it as it also ignored the applicable decisions of this Court relating to the question. The lower court strayed so far afield as to imply that petitioner is on probation, despite the fact that the judgment of the Buncombe County Court did not require petitioner to remain in North Carolina, to report to any agency, and went so far as to discharge petitioner's bond at the time judgment was imposed upon him. The Buncombe County Court, in its judgment, said in effect that if petitioner would behave himself he might pay a fine instead of going to jail. The Findings of Fact (R. 208-9) indicate payment of the fine, petitioner's good behavior and the lack of any charge of misbehavior, a clean cut finding of full compliance by petitioner with every requirement of judgment imposed upon him. Yet, the lower court holds petitioner to be a fugitive for the sole and simple reason that his former prosecutor, filled with revenge and now a judge, has ordered petitioner's arrest. That order is the only basis for these proceedings, yet, it was issued by a judge who was assigned by law (R. 15) to another court, who was barred by all principles of law and decency from acting in this case after having previously prosecuted it. This illegal order was issued without the knowledge of the

present prosecutor (R. 281) and without any request or affidavit of anyone (R. 208-9). In arrogant fashion the judicial tyrant who issued the order refuses to give one reason to justify the order of arrest. (R. 232)

Petitioner mentions these matters to show the illegality of the entire proceeding but respondent glibly echoes the lower court's evasion by saying "We can't inquire into motives". Justifying this statement respondent cites cases not one of which applies here. In every case mentioned by him either the alleged fugitive had never been punished after conviction or had never been tried in the demanding state. Petitioner has suffered both. Not one case can be found by the respondent, out of all the millions of cases in the law books, which holds that one who has paid a fine under an indictment may be extradited for further punishment under that same indictment. Nor will there be found one case in which extradition was even requested.

Despite the malodorous and unconscionable facts disclosed by the record in this case, wherein a judge was so lacking in conscience and principle and so overwhelmed by his own personal dislike for the petitioner as to have himself transferred out of his own judicial district (R. 15) into another judicial district so that he could there remove from the musty files a case long since closed, with the bond released and discharged, and then arbitrarily order the arrest and extradition of petitioner, whom he personally had prosecuted in this identical case, the respondent, suavely evading the real issues, sets forth excerpts from cases wholly inapplicable and has the temerity to urge upon this August and Honorable Court that such proceedings constitute Due Process of Law, and in no way infringe the Civil Liberties of the petitioner.

This horrifying picture is further aggravated by the action of the lower Court in refusing to consider anything other than that the indictment appeared valid on its face and was accompanied by the governor's certification. According to the lower court the mere fact that petitioner had previously been tried, convicted and punished on that indict-

ment was unimportant and even though he were found not guilty on the indictment such fact may not be considered for "we must confine ourselves to the extradition papers alone, All other matters must be taken up in the demanding state", all in disregard of the applicable decision of this Court in *Johnson* v. *Zerbst*, 304 U. S. 458, which laid down the rule that ". . . it is open to the courts of the United States upon an application for a Writ of Habeas Corpus to look beyond forms and inquire into the very substance of the matter, . . .". Obviously, the lower court erred in ruling that it was without power to go behind the requisition of the Governor and that all such matters were within the Governor's discretion (R. 73) and that the court was confined to an inspection of the extradition papers (R. 74). Certainly, in such suspicious circumstances the question of good faith was interwoven with the question of whether or not extradition is sought for a bona fide purpose. The lower court was not bound to perform an idle act merely to satisfy the lust and hatred of petitioner's former prosecutor, now misusing his power as a judge.

RULES OF LAW ESTABLISHED IF CERTIORARI IS DENIED.

The lower court has made its ruling. Denial of Certiorari places the stamp of approval upon that opinion and establishes the following as the law under which one hundred and thirty-five million citizens of the United States of America must live from now on:—

1. Habeas Corpus is no protection against an outrageous abuse of judicial power in the issuance of an order of arrest without any reason whatsoever being offered to justify its issuance.

2. Although a man has been sentenced to either pay a fine or go to jail on one count of an indictment, having elected to pay the fine, that court may still punish him again on that and all of the other counts in that same indictment.

3. A court may induce a defendant to waive his right of appeal by suspending sentence on one of two counts and requiring him to pay a fine on the other count then, long after the time for taking an appeal has expired, impose another sentence at the caprice of the former prosecutor, now become judge.

4. On Habeas Corpus a court may hold a man to be a fugitive although the Findings of Fact (R. 208-9) clearly indicate the payment of a fine and no subsequent charge of misbehavior.

5. Two judgments on the same verdict at separate times may be imposed.

6. Habeas Corpus on extradition looks not to the substance of the demand but only at the face of the papers and if they appear to be in the usual or proper form, there is no alternative other than to order that the alleged fugitive be extradited though he may have already been punished or acquitted.

7. The issuance of a capias without any paper, affidavit, allegation of misbehavior, or other charge makes a man a fugitive even though the judge who issued the capias refuses to give any reason for its issuance (R. 232).

8. Any judge may indulge his hatred for a person of a different race, creed, religion or political belief by his own whim or caprice and if the object of his hatred is in another state the action of the tyrant may not be questioned and Habeas Corpus is powerless to afford relief in such circumstances.

9. One who has been tried and punished or acquitted on an indictment may not show such fact on extradition for such matters are outside the record and the court must confine itself to a scrutiny of the extradition papers containing the second-hand indictment and certification that the charge contained in it constitutes a crime.

10. For a prosecutor, who becomes a judge, thereafter to inject himself into a case previously prosecuted by him is no violation of the Due Process Clauses of the Constitution.

11. Although the law of a state forbids keeping a man under suspension of sentence in excess of five years such statute may be evaded by the mere issuance of a capias without any legal reason for its issuance.

12. Sentence on one count of an indictment does not bar subsequent sentences on each of the other counts of the indictment upon which any man has been convicted.

13. An indictment upon which a man has been tried, convicted and sentenced does not lose its efficacy by that reason and is just as sacred for purposes of extradition as though the man had never been tried or punished under it.

14. The courts of the demanding state are powerless to inquire into the injustice of a demand for the return of an alleged fugitive.

15. It is no violation of the Due Process Clause of the Constitution for a prosecutor, who afterward becomes judge, to inject himself into a case which he had previously prosecuted.

16. A suspended sentence may be revoked at any time without giving any reason for revocation.

17. On Habeas Corpus the courts of the asylum state are barred from considering the law of the demanding state in deciding the question of fugitivity.

18. No evidence may be offered by the alleged fugitive on Habeas Corpus to show that his return has been sought not for a legal reason but only to gratify the personal malice of his former prosecutor.

19. One whose extradition is sought has no right to know who pays the compensation of his prosecutors, even though

the record clearly indicates that his prosecutors are receiving compensation from private sources.

20. The governor's seal upon extradition papers is so sacred that it may not be questioned and no evidence may be offered to show that in reality the alleged fugitive is not a fugitive and that his extradition is sought for an illegal purpose.

21. Questions of lack of good faith or of jurisdiction in the courts of the demanding state may only be decided in the courts of the demanding state because the courts of the asylum state must confine their scrutiny to the extradition papers alone.

Astonishing as the foregoing may sound, each and every one is the rule laid down by the lower court and each is the law of the land if certiorari is denied.

Respectfully submitted,

T. Edward O'Connell,
Attorney for Petitioner.